No. 83-6392

In The

Supreme Court of the United States

October Term, 1983

JAMES LOUDERMILL
Cross-Petitioner

-vs-

THE CLEVELAND BOARD OF EDUCATION, et al.
Cross-Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE CROSS-PETITIONER

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QUESTIONS PRESENTED

1. Is a discharged civil service employee, who has a property interest in his employment, and was denied any pretermination procedures, denied due process of law as guaranteed by the Fourteenth Amendment when a nine (9) month period expired between the time of his termination and a decision of his posttermination administrative appeal?

2. Is a discharged civil servant's Fourteenth Amendment's liberty interest violated when unproven and unjustified references alleging dishonesty are disseminated among potential employers during the nine (9) months elapsing between his termination and the decision of his posttermination administrative appeal, which foreclosed and stifled his opportunity for other employment?

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OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 721 F.2d 550, was rendered on November 17, 1983, and can also be found in Petitioner's Appendix in Case No. 83-1362 at A1-A33. The two Opinions of the District Court were rendered on November 6, 1981 and

February 22, 1982 respectively, and will be found in Petitioner's Appendix in Case No. 83-1362 at A34-A39 and A50-A62 respectively.

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit was entered on November 17, 1983. Petitioner appealed to this Court on February 14, 1984, followed by Loudermill's Cross-Petition on March 8, 1984, both being granted on May 21, 1984. The jurisdiction of this Court resting upon 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Loudermill was a security guard for the Cleveland Board of Education and was a classified civil service employee who could only be terminated for "cause." He was terminated by a letter on November 3, 1980 for alleged dishonesty in filling out his employment application; without any prior opportunity, written or oral, before the Board of Education to contest the charges against him, although he had a legitimate defense; i.e., he honestly thought he had been convicted of a misdemeanor twelve years prior to his application (which asked if he had ever been convicted of a felony). Loudermill, through counsel, then filed a Notice of Appeal with the Cleveland Civil Service Commission on

November 12, 1980. The appointing authority, the Cleveland Board of Education, confirmed Loudermill's removal on November 13, 1980, but never filed an order of removal with the Commission. The Commission failed to disaffirm Loudermill's removal, although they were required to do so by Ohio Administrative Code Rule 124-03-01(B). A hearing was originally scheduled before a Referee of the Commission on January 22, 1981, but was continued until January 29, 1981 - almost three (3) months after Loudermill was removed. The Referee, who was a practicing, highly ethical, attorney filed his recommendations on April 1, 1981, recommending that Loudermill's removal be disaffirmed. A hearing before the full Commission was not held until July 20, 1981, more than eight (8) months after his Notice of Appeal was filed, and affirmed Loudermill's removal, although they heard no testimony. The Commission then instructed the Board of Education to prepare Findings of Fact and Conclusions of Law, and they were filed on August 10, 1981. Since a judicial appeal could not be taken until such filing, Loudermill could not disentangle himself from state administrative proceedings until nine (9) months after his discharge. Loudermill then filed a Complaint in federal

ccurt pursuant to the federal civil rights act for monetary, declaratory and injunctive relief, accompanied by Motion to Certify as a Class Action and for a Preliminary Injunction, and that Loudermill's case be consolidated with that of Richard Donnelly v. Parma Board of Education, et al., filed on the same day. Both cases were dismissed with prejudice by the District Court on November 6, 1981. Loudermill and Donnelly then filed a Motion to Alter or Amend Judgment on November 16, 1981, which was overruled by the trial court on February 22, 1982. They then filed timely Notices of Appeal to the Sixth Circuit Court of Appeals which affirmed the District Court's dismissal of Loudermill's complaint (which alleged that the delay in his post-termination hearings violated his liberty and due process rights), but vacated and remanded for further consideration the trial court's judgment that dismissed the pre-termination procedural due process claims of both Loudermill and Donnelly. Petitions for a Writ of Certiorari were then filed to this Court by The Cleveland Board of Education and the Parma Board of Education, followed by only Loudermill's Cross-Petition - all three appeals being accepted by this Court.

SUMMARY OF ARGUMENT

There are broad concepts or generalities that can be deduced from reading all the cases that have dealt with the concept of due process. As with all generalities, there are exceptions, so that it is near impossible to arrive at propositions of law that have the precision of the physical sciences. However, these concepts or generalities give insight into what are, and what are not, acceptable due process procedures:

1. The basic purpose of due process is to assure reliable determinations of official governmental actions depriving citizens of property or liberty interests.
2. The determination of due process requirements is directly proportional to the degree of traditional judicial fact-finding procedures involved in the deprivation.
3. The permitted length of the post-deprivation procedures is directly proportional to the reliability of the pre-deprivation procedures.

In addition to the case law on due process principles previously discussed, the constitutional word "deprived" is synonomous with the psychological word "loss," so that a constitutional infraction not only constitutes a physical loss to the deprived victim,

but a crippling emotional loss as well, resulting in governmental action impairing an individual's ability to perform as a free citizen. Emotional shackles are no less restrictive than shackles made of steel.

Additionally, once government places a cloud on someone's good name, reputation and character, there simultaneously occurs a governmental impairment of that person's liberty interest, preventing him or her from being unbiasedly judged in the marketplace, and that cloud progressively darkens as a full evidentiary hearing is delayed.

Finally, and of critical importance, Ohio has no statutory scheme or machinery which automatically provides due process protection by assuring either a pre or post deprivation hearing to a vested governmental employee.

ARGUMENT

"Justice delayed, is justice denied."

Counsel has often thought how expeditious it would be if this Court had its own private police force, and you could summon them to immediately respond when the federal constitution was being violated - in much the same manner that local police respond when there is a call that a criminal statute or ordinance has been breached. But, how dif-

ferent law and order would be if a call to the local police was a herculean task of time and money, and the response time was three to four years or longer - and then the odds were about 200 to 1 that your call would be completed.

And as you sit on the incredibly uncomfortable benches waiting for your client's name to be called, prior to an administrative review board hearing; you look around at the other occupants of the room and see the "Titanic Look" on their faces, as both you and they inwardly know that it's only a matter of time until you all go down. But, as you sit and wait, one thought prevails: PROTECT THE RECORD, because you know that when you say "Due Process, Fourteenth Amendment and Supreme Court of the United States," they don't know what you are talking about and couldn't care less.

Hang in there on principle alone, and hope that you can ultimately get to a federal court, as you have never been successful in a state court on a federal constitutional question. Finally, you file in federal court and draw a judge who has the lowest case load in the district, but probably the highest rate of dismissal, and so to the Circuit Court of Appeals - where someone finally

listens to you - but, of greater importance - understands what you have to say. And this is what you have to say.

The requirements of due process are flexible, and are to be determined by the circumstances involved in each case. Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).

The primary function of due process is to minimize the risk of erroneous decisions, see Mackey v. Montrym, 443 U.S. 1, 13 (1979), and the right to a hearing is not required when the initial decision is sufficiently reliable due to a minimized chance for wrongful deprivation. For example, please see Ingraham v. Wright, 430 U.S. 651, 677-678 (1977), where this Court refused to grant hearing rights to students subject to corporal punishment, becuase of an insignificant chance of abuse due to the openness of the classroom.

The distinction, as to when a hearing is, or is not required, is clearly shown in Califano v. Yamasaki, 442 U.S. 682 (1979). That case dealt with the authority of the Secretary of H.E.W. to recoup erroneous Social Security overpayments. The recipient was given the option to file for reconsideration of the Secretary's decision (that an

overpayment had been made), or he could ask the Secretary to waive his right to recoupment of such overpayments. It was decided therein that recipients who filed for reconsideration were not entitled to a hearing, because the decision was based upon a relatively straight forward computation. On the other hand, recipients who filed for a waiver were entitled to a hearing, since the decision was then based upon a broad "fault" standard, where credibility of witnesses was essential.

Central to the evaluation of any administrative procedure is the nature of the relevant inquiry. See Mitchell v. W.T. Grant Co., 416 U.S. 600, 617 (1974). In Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78, 89-90 (1978), this Court held that students facing academic dismissals were not entitled to a due process hearing, as their dismissal was subjective, but evaluative of facts not in issue, distinguishing the case of Goss v. Lopez, 419 U.S. 565 (1975), which required a prior due process hearing for disciplinary suspensions, as there was a need for traditional fact finding.

In determining the extent of the required procedures, including the acceptable

delays in post-deprivation hearings, consideration must be given to whether the inquiry is sufficiently akin to traditional judicial fact-finding.

Cases where the credibility of witnesses are essential must be distinguished from those where it is not. Or to state the proposition in another manner: Where the credibility of witnesses is critical, there must be a sufficiently prompt post-deprivation hearing.

Therefore, the present factual situation of Loudermill must be distinguished from Mathews v. Eldridge, 424 U.S. 319 (1976), which upheld delays in the post-deprivation hearings for the termination of Social Security disability benefits of ten to eleven months, because the decision to terminate such benefits was based upon a medical assessment of the recipient's physical or mental condition, which in most cases turn upon a "routine, standard and unbiased medical report by a physician specialist," quoting from Richardson v. Perales, 402 U.S. 389, 404 (1971). Questions of credibility and veracity of witnesses were not involved in the Mathews v. Eldridge case; and, accordingly, there was no need for a prompt post-deprivation hearing.

As an example of the weight afforded an administrative hearing, it should be noted that res judicata is given effect to a finding of an administrative agency only when it acts in a traditional judicial capacity. See Kremer v. Chemical Construction Co., 456 U.S. 461, 484 n. 26 (1982); citing United States v Utah Construction and Mining Co., 384 U.S. 394 (1966).

Loudermill's case deals with a "broad fault standard which is inherently subject to factual determination and adversarial input." Mitchell v. W.T. Grant Co., supra, p. 617.

Evaluating fault usually requires an assessment of credibility, and written submissions are particularly inappropriate. See Califano v. Yamasaki, supra, p. 697. Therefore, the delay in the present case, where the resemblance of traditional fact-finding is unavoidable, must be contrasted with cases such as Mathews v. Eldridge, supra, where it is missing.

The rapidity of administrative review is a significant factor in assessing its constitutionality. See Fusari v. Steinberg, 419 U.S. 379, 389 (1975). If there are reliable pre-deprivation procedures available, then the time for the post-deprivation procedures is not nearly as critical as when reliable

pre-deprivation procedures are lacking. The length of the allowable post-deprivation delay is, therefore, directly proportional to the reliability of the pre-deprivation procedurers. The question of what is, or is not "reliable post-deprivation procedures" is how closely they resemble judicial fact-finding procedures.

This Court decided in Arnett v. Kennedy, 416 U.S. 134 (1976), that a pre-deprivation evidentiary hearing was not required prior to the termination of a non-probationary public employee. However, the employee therein was entitled to certain pre-deprivation procedures, such as the opportunity to present oral and written responses to the charges against him. As this Court said in Mackey v. Montrym supra, p. 13:

> And when prompt post-deprivation review is available for correction of administrative error, we have generally required no more than that the predeprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as responsible governmental official warrants them to be.

In the present case, Loudermill did not have a prompt post-deprivation hearing to correct the administrative unfairness.

Parratt v. Taylor, 451 U.S. 527, 539 (1981), held that an individual may be deprived of his property without any pre-deprivation hearing only if there was a necessity for quick action by the State, or the impracticality of providing any meaningful pre-deprivation procedure. It then follows that if some pre-deprivation procedure (although not necessarily a full hearing) is essential in most cases, then a prompt post-deprivation full hearing must also be provided.

This Court has repeatedly held that where an individual may be deprived of his property after only an informal proceeding, then a full evidentiary hearing must be held promptly thereafter. See Barry v. Barchi, 443 U.S. 55, 72 (1979), (Brennan, J. concurring); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 608 (1975), and Goldberg v. Kelly, 397 U.S. 254, 266 (1970).

The purpose of the Ohio civil service statutes is to provide civil servants with prompt review of disciplinary actions against them by an agency with expertise in the area. See State, ex rel. Shine v. Garafolo, 69 Ohio St. 253, 256 (1982). Therefore, a terminated non-probationary civil servant must be given a prompt post-deprivation evidentiary hearing.

Of great concern to this writer, however, is the fact that the post-deprivation hearing provided for by Ohio statute isn't automatic; and for the unsophisticated civil servant, who must take affirmative action within ten (10) days of the date his discharge order is filed, or otherwise waive all chance for a hearing, the danger of there being no hearing at all is very real. Further, a ten (10) day statute of limitations seems totally unreasonable in light of the gravity of the interest involved.

One of the purposes of procedural due process is to give the individual, who has been deprived of his property, the feeling that he was treated fairly by the government. See Carey v. Piphus, 435 U.S. 247, 262(1978).

This Court has held that long delays in criminal cases may subject the accused to emotional distress. Strunk v. United States, 412 U.S. 434, 439 (1973). Counsel will discuss this aspect of long delay in his Liberty Interest argument, infra, but suffice it to say, at this point, that the trauma is quite comparable.

The temporary loss of income, ultimately hoped to be recovered, does not usually constitute irreparable injury. See Sampson v. Murray, 415 U.S. 61, 90 (1974). However,

lengthy delays in the post-termination proceedings not only cause psychological damage, but the employee may be incapable of getting employment in the private sector. Arnett v. Kennedy, supra, p. 194, (White, J. concurring in part and dissenting in part.)

In Arnett v. Kennedy, supra, p. 169, Justice Powell distinguished the case of the termination of a public employee from the case of Goldberg v. Kelly, supra, which dealt with the termination of welfare benefits, by stating:

> Indeed, as the Court stated in that case "the crucial factor in this context - a factor not present in the case of ..... the discharged government employee .. is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits" Id. at 264 (emphasis added). By contrast, a public employee may well have independent resources to overcome any temporary hardship, and he may be able to secure a job in the private sector. Alternatively, he will be eligible for welfare benefits.

However, the issue in Arnett v. Kennedy, supra, was whether or not a pre-termination

evidentiary hearing was required. Therein, Justice Powell based his opinion upon a balance of the government's interest in removing an inefficient employee with the employee's interest in continuing his employment. However, once an employee is terminated, the governmental interest in removing the non-productive employee becomes moot.

The Court of Appeals herein held that Loudermill was not denied due process since he did have a hearing within three (3) months after he was terminated. However, once an employee is discharged, he not only is entitled to a prompt hearing, but also a prompt disposition of his appeal. Barry v. Barchi, supra, p. 61.

Loudermill's discharge stated that he was terminated for "dishonesty." As Justice Frankfurter stated in his concurring opinion in Anti-Facist Committee v. McGrath, 341 U.S. 123, 168 (1951):

> The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.

When a person's good name, reputation, honor or integrity is at stake, because of

what the government is doing to him, notice and an opportunity to be heard are essential. See Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

The suggestion of the Court of Appeals, in their Opinion herein, that the employee can file the extraordinary writ of mandamus is totally inaccessible to the average person for three reasons: (1) The financial ability of the individual would probably not be sufficient to hire competent counsel; (2) The complexities of a mandamus action are beyond the limitations of the average attorney, and (3) The granting of a writ of mandamus is discretionary with the court, and is rarely issued.

Certainly, the ability of the individual to protect himself against governmental arbitrariness is not nearly comparable to the awesome power, resources, and staying ability of the government in preventing him from succeeding - resulting in this Court's position that the ability of an individual to protect his own interest does not relieve the government of its constitutional obligations. For example, see Mennonite Board of Missions v. Adams, ___U.S.___, 103 S. Ct. 2706, 2712 (1983), which required personal or certified mail notice of a tax sale to mortgagees, even

though sophisticated creditors could discover that taxes were owing, and that the property would be sold. To the same effect, Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981), where it was held that the fact that a wife could take steps to prevent a sale of her jointly owned property by her husband, did not validate a statute that permitted a husband to transfer jointly owned property without his wife's consent.

To be "deprived" of something is to have "lost" something. In a superb Bantam Book (that is one of this author's favorite books) entitled, How to Survive the Loss of a Love; a psychiatrist, psychologist and a poet combine their perspectives to explain the inner wound of a loss, and the healing process that must be undergone for recovery. Losses are categorized, and among the most hurtful of all losses is "Limbo."

> It is important to note that the feeling of being "in limbo" is in itself a loss ... Realize that "not knowing" may be the worst torture of all.

For Loudermill, everything would have ended on November 3, 1980, when he received his surprise letter of termination, if he had done nothing thereafter - but he managed to obtain a quixotic lawyer to represent him.

Deprived of a pre-termination hearing, he was then kept "in limbo" by the government for nine (9) months until his administrative governmental rights were concluded. Accordingly, there was a double loss: the loss of his job, and governmental procedures that kept him "in limbo" for nine months - thereby preventing him from commencing the emotional healing process and getting on with his life.

However, of utmost importance is the fact that if Loudermill had simply accepted the letter of termination, and done nothing, there was no state statutory scheme or machinery which would have automatically given him a pre-deprivation or post-deprivation hearing, without the aid of counsel. It is highly possible that for many discharged civil servants, who do not think to employ counsel or who cannot afford to employ counsel; that their property interest in their governmental job ends with their letter of termination.

Concomitant with the reliability involved in determining whether the time for post-deprivation hearings is critical is the gravity of the loss as it affects the deprived person. Further consideration must be given to the subtle, but very real, frame of mind of both the deprived person and other poten-

tial employers in the market place.

The deprived person may very well have the hopeful, naive belief that once an impartial post-deprivation hearing is had, his discharge will be nullified, and he will be re-instated. Accordingly, his energies and resources are directed towards what once was, as he cannot reconcile his mind to the fact that his job may be lost forever. Once they hear my side of the story, I will be vindicated, he thinks to himself.

From the standpoint of a potentially new employer, there is the handicap of the stigma of discharge on the potential former governmental employee; and the concern that the potential employee may only be taking the job on a temporary basis until his former job is restored. The potential employer may also think about the costs of training the former governmental worker, and the delay involved until he becomes productive.

The situation is analogous to a loved one dying quickly, as contrasted with a loved one experiencing a lingering death. In the first instance, there is finality, and you can start the healing and recovery procedure immediately; whereas, in the latter instance, finality only comes after long suffering, and the healing process is thereby delayed.

Query: Is it the purpose of government to engage in quick and final euthanasia by treating a discharged civil servant humanely, or is it the purpose of government to be indifferent and prolong the emotional damage by delaying the date when the recovery process can commence?

THE LIBERTY INTEREST

Good name in man and woman, dear my lord,
Is the immediate jewel of their souls:
Who steals my purse steals thrash;
'tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands:
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed.
Shakespeare's "Othello,"
Act III, Scene iii, Line 155

Counsel has always believed that in our Constitution, life, liberty and property was never intended to be three separate entities, but three interrelated threads that are so tightly interwoven as to comprise the very fabric of that document. Nor was priority given to those three words because of their sequence; so that life rates above liberty which rates above property. To the contrary, historically, constitutional emphasis was conceived on the paramount rights of the free and law-abiding citizen , who did not commit crimes against society, being able to enjoy life and liberty, and pursuing and obtaining happiness and safety. In that context, life was broader in spectrum in our Constitution's history that merely being limited to life and

death. Yet, the life portion of our Constitution has been limited to capital punishment situations by interpretation. But, history does not support this narrow limitation.

For example, in the Magna Carta:

> No freeman shall be taken, or imprisoned or outlawed or exiled, or in any manner harmed, nor will we go upon him, nor will we send upon him, except by the legal judgment of his peers or by the law of the land. Clause 39
>
> To none will we sell, to none deny or delay, right or justice. Clause 40

In commenting on the Magna Carta, under the term "personal security" and "freedom from injustice," Blackstone defends "enjoyment of life, limb, body, health and reputation." 1 Blackstone Comm. 129. And further, "Next to personal security, the law of England regards, asserts and preserves the personal liberty of individuals." 1 Blackstone Comm. 134.

That life meant "the enjoyment of life," was then demonstrated in the Virginia Declaration of Rights, authored by George Mason, and adopted in June of 1776, wherein the document spoke of " ... the enjoyment of life and liberty." One month later, on July 4, 1776, the Declaration of Independence, auth-

ored by Thomas Jefferson, was adopted, and spoke of " ... life, liberty and the pursuit of happiness."

The total historical concept of a free citizen's life being insulated from governmental injustice was then embodied into the Bill of Rights in 1791 by James Madison using the words, "life, liberty and property."

Mason, Jefferson and Madison knew each other. They knew the heritage from which they drew their thoughts and language, and they most certainly knew each other's thinking and work. Accordingly, when Madison wrote the word "life" in the Bill of Rights, it seems clear to this writer that it was understood, by all who participated in the adoption of the Constitution, to mean "the enjoyment of life," and that the government was not to interfere with, impair or deprive a free citizen of his enjoyment of life without due process of law.

In Justice Stewart's concurring opinion in Roe v. Wade, 410 U.S. 113, 167-171 (1973), substantive due process and a liberty interest were relied upon, but it is respectfully suggested that it was a life interest that was involved. However, as argued above, the words, "life, liberty and property" were intended to be so homogenized as to now merge

the two questions presented in Loudermill's Cross-Petition.

> They [the makers of the Constitution] conferred, as against the Government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized man.
>
> Olmstead v. United States, 277 U.S. 438, 478 (1928)

Unlike the employee in Board of Regents v. Roth, 408 U.S. 564, 573 (1972), Loudermill was terminated for "dishonesty," which foreclosed him from taking advantage of other employment opportunities. It is not the defamation itself that rises to a constitutional level, but the defamation in the deprivation of a previously recognized status. As this Court stated in Paul v. Davis, 424 U.S. 693, 711 (1976):

> In each of these cases, as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment. But

> the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the "liberty" or "property" recognized in those decisions .....

In order to further the purposes of the federal civil rights act, 42 United States Code Section 1983, rules governing the compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question, and the common law rules are applicable. Carey v. Piphus, supra, p. 259.

When legal rights have been violated, and a federal statute provides a general right to sue for such violation, the federal courts may use any available remedy to make good the wrong done. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969). Also see, 42 U.S.C. Sec. 1988.

There is no logical reason as to why a person, whose federally guaranteed rights have been violated, should be granted a less restrictive remedy than a person asserting an ordinary tort cause of action, Smith v. Wade, ___U.S.___,___, 103 S. Ct. 1625, 1636 (1983),

and a person is deprived of a "liberty" interest protected by the Due Process Clause when he is terminated for reasons that foreclose his opportunity to take advantage of future employment situations. Board of Regents v. Roth, supra.

The requirement of "publication" must be equivalent to the common law requirement that the defamatory statements be communicated to another party, and the refusal of potential employers to hire Loudermill, upon obtaining the reason for his termination from the Cleveland Board of Education, is sufficient.

In Goss v. Lopez, 419 U.S. 565 575 (1975), this Court, in dealing with the constitutional implications of the disciplinary suspension of high school students, said:

> If sustained and recorded, those charges could seriously damage the students standing with their fellow pupils and their teachers, as well as interfere with later opportunities for higher education and employment.

The right to continued employment involved herein is at least as substantial as the right to education involved in Goss v. Lopez, supra; see Logan v. Zimmerman Brush Co., et al., 455 U.S. 422, 431 (1982), and, by virtue thereof, Loudermill was also entitled to pre-

deprivation procedures for the deprivation of a constitutionally protected "liberty" interest.

A SUGGESTED SOLUTION

> Stare decisis is usually the wise policy because in most matters it is more important that the applicable rule of law be settled than that it be settled right ... But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function. Burnet v. Coronado Oil and Gas Co., 285 U.S. 393, 406 (1932)

The State of Ohio has taken special precautions to comply with federal constitutional requirements in a criminal prosecution, so that if a trial is not held within a certain period of time, the accused goes free. The State of Ohio has also placed a time limitation on the post-termination hearing of a classified civil service employee. See Ohio Revised Code Sec. 124.34, (to be found in the

Petition for Writ of Certiorari in Case No. 83-1362 on Page A4, footnote 2).

In criminal proceedings (where there may be a life, liberty or property interest involved), a dismissal of the charges is the only remedy for the denial of a right to a speedy trial, see Strunk v. United States, supra; and, by analogy, a disaffirmance of a termination order would be an effective remedy for the denial of a pre-deprivation hearing or an automatic prompt post-deprivation hearing and disposition.

Additionally, the thirty (30) day requirement of Ohio Rev. Code Sec. 124.34, supra, within which a post-deprivation hearing is to be had, is a reasonable time limitation for an appeal hearing and a near immediate decision, due to the similarity of a criminal trial proceeding. If a judge in a criminal proceeding (with or without a jury) can render a verdict upon the conclusion of all the evidence, then there is no justifiable reason why an administrative body or their delegated official cannot do likewise in a post-deprivation proceeding.

CONCLUSION

> When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.
>
> Abrams v. United States, 250 U.S. 616, 630 (1919)

In 1940, there were 4.47 million governmental employees (federal, state and local) in the United States; whereas in 1980, there were 16.2 million, or an increase of 262% in governmental employees during that forty year period.

In 1940, the population of the United States was 132.6 million, whereas in 1980, it had increased to 227 million, constituting an increase of 71% in the population.

Stated in another manner, since 1940, governmental employees have increased 3.7

times faster than the population of the United States. Statistical Abstract of the United States, 1984, Employment Series GE No. 1, and Current Population Reports, series P-25, Bureau of the Census.

It is now 1984, but we have not arrived at the "Big Brother" type of government fictionalized by George Orwell. Nevertheless, we have possibly arrived at a type of government that can be described as "Little Mother" in that the day of the rugged individualist of colonial times, who asked very little from his government, has progressively changed to a present day society that expects, demands and needs more from government - whether it be retirement security, medical care, welfare or employment and job security.

As Justice Oliver Wendell Holmes, Jr. stated in Abrams v. United States, supra, and whose words are even more timely today than they were in 1919, the simple truth of the matter is that government now has assumed the responsibility of caring for and about those governmental employees who serve it and make it function. Indeed, if the government cares about those who cannot care for themselves, then there is a higher responsibility for government to care about those who make the governmental machinery work for those who now

need governmental care, or may need it in the future. Otherwise, the arduous ascent and emotional beatings that Loudermill has experienced in getting to this Court are meaningless, if those governmental employees who follow him find themselves in the same predicament he found himself in on November 13, 1980.

The pressured administrative appeal that should have happened without the intervention of an attorney, the wait, the incredibly uncomfortable benches, the limbo, the inability to obtain other employment due to the stigma, the callous and indifferent attitude towards the federal Constitution and this Court by administrative entities and appellate bodies, and the ultimate realization that no one is willing to listen to your side of the story, or really cares. Vicariously, this writer does not want to experience that helpless frustration again.

Surely, one who serves his government deserves more, and should expect more from his government, than arbitrary, high-handed treatment.

It's a secure feeling to be an "in," but it's a grievous hurt to wake up one morning to find that you're an "out," and there is no immediate recourse or relief available.

Loudermill, on behalf of himself and all future Loudermills, respectfully asks that this Court answer in the affirmative to the two questions he has had the privilege of posing in this, his Cross-Petition Brief.

Respectfully submitted,

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